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# Dispute Resolution Round-up

# Apprenticeships – a new era

In the 2015 Conservative manifesto the Government promised to deliver 3 million apprenticeships over the next 5 years. As part of that process, from April 2017 will see the introduction of the Apprenticeship Levy. With the concern of a skills gap in some sectors particularly within the construction sector this would seem to be an opportune moment for all businesses to review their training needs and in particular, their requirements for apprenticeships.

The Apprenticeship Levy will be 0.5% of the pay bill and will be collected through the PAYE system from April 2017. There will be an allowance of £15,000 to offset any against levy liability and therefore in practice, the levy will only apply to employers with a pay bill of more than £3 million per year.

For all those employers paying the levy, the Government will apply a 10% top up to the funds for spending on Apprenticeship Training. The employers will be required to set up a Digital Apprenticeship Account into which all their levy contributions will be paid and from which they will pay for their apprenticeship training. The onus will be on the employer to engage apprentices in order to utilise their levy fund and if there are any unused funds within the digital account after 18 months, these funds will expire.

For those employers who do not have a pay bill of more than £3 million per year and are therefore "non levy paying employers" the cost of employing apprentices will be co-funded between the employer and the Skills Funding Agency ("the SFA"). The current proposals in relation to co-funding rates identify 15 funding bands into which all existing new apprenticeship frameworks will be placed. The upper limit to the funding band will cap the maximum price the Government will co-invest. The Government has confirmed that for SME's, unlike the levy paying employers, they will not be required to sign up to the Digital Apprenticeship Service account until at least 2018. This will enable employers more time to prepare for the new system.

### So what does this mean for employers now?

Given the introduction of the levy in April 2017 Colleges and other external training providers are being encouraged to prepare for this change by speaking with local employers in their areas to discuss their training needs and, in particular, any plans for the recruitment of apprentices. Similarly, this is an ideal opportunity for employers who traditionally have taken on apprentices or those who are considering apprentices for the first time to be proactive and to get in touch with their local College or training provider and discuss their requirements to enable the Colleges to prepare and plan their future provision.

Inevitably, whether the Government will meet their 3 million target will, to a large extent, be dependant upon how successful the new scheme is. Let's hope it is a success and we will see a new wave of apprentices who can develop their own skills whilst at the same time contributing to the development of their employers' businesses.

*Caroline Hardcastle*

## Also in this issue

# The "Batman" strikes back!

On 7 March 2016 a case of the Bat Conservation Trust concluded in the Derby Crown Court and resulted in the "most significant conviction for bat crime ever recorded".

The case involved a small building development company called ISAR Developments Limited which was convicted of destroying (in the course of its redevelopment of a building site) a roost used by brown long-eared bats.

The particular relevance of this case is not so much the fine (which was a relatively low £3,000) but the Proceeds of Crime Confiscation Order that the Court went on to make. In that regard both the Defendants and the Prosecution had agreed that by destroying the roost, ISAR Developments Limited had gained a financial benefit in the sum of £5,730. Accordingly the Court made a Proceeds of Crime Confiscation Order in that sum.

Again the amount involved is not particularly large. However it is the principle upon which the Order was based which is important. Had the financial benefit been a vastly more significant sum then the Proceeds of Crime Confiscation Order would have been vastly more significant. The moral appears to be that developers should not be tempted to destroy bat roosts (or the habitat of other protected species) with a view to financial gain (or to avoid a financial loss) because if convicted the Court will not limit its sanction to a fine and requiring the developer to pay the Prosecution's legal costs but it is now likely to confiscate the developer's assets to the value of a financial benefit deriving from the destruction of the habitat concerned.

*George Coyle*

# LASPO to apply to Insolvency Proceedings from April 2016

On 17 December 2015, Minister of State for Civil Justice, Lord Faulks QC, delivered the long awaited ministerial statement regarding the reforms to litigation funding in regarding to insolvency proceedings.

Despite strong resistance to the end of the exemption to insolvency proceedings of the reforms to the operation of no win, no fee conditional fee agreements, Lord Faulks said in his ministerial statement:-

*"The Government has made a priority of addressing the high costs of Civil Litigation in England and Wales.*

*To that end, Part 2 of the Legal Aid, Sentencing and Punishing of Offenders Act 2012 reforms the operation of no win, no fee conditional fee agreements. Those reforms came into effect generally in April 2013 but were delayed in respect of insolvency proceedings.*

*After further consideration, the Government has decided that the 'no win, no fee' reform should now be applied to insolvency proceedings. The provisions will come into force for these cases in April 2016".*

From the statement, it was apparent that Lord Faulks considered that there had been sufficient time for insolvency professionals to adapt to the recent changes in civil litigation funding that civil litigators had been dealing with since April 2013. This opinion was not however shared by R3, one of the professional bodies who have continually opposed the implementation of Sections 44 and 46 of LASPO. R3's President, Phillip Sykes, expressed deep disappointment in Lord Faulks' decision to curtail the exemption to insolvency proceedings and said, in response:-

*"The Government is potentially writing off hundreds of millions of pounds per year owed to not just HMRC, but to hundreds, if not thousands, of ordinary honest businesses as well.*

*The only winners today are the rogue directors and others who refuse to repay money owed to creditors after an insolvency. We're back to an uneven playing field, where rogue directors hold all the cards – and the cash.*

*The end of the exemption leaves a huge funding black hole for insolvency litigation. This is a blow to the wider business community and the insolvency profession".*

Whilst the LASPO exemption came to an end in April 2016, the same ministerial statement confirmed that there was to be a post-implementation review of the LASPO Part 2 reforms between April 2016 and April 2018.

*Christina Sledmore*

# Sale of goods update

In recent months we have seen several developments in the law relating to the sale of goods, all of which bring new principles for businesses to get to grips with.

## The Consumer Rights Act 2015

The fundamental change to the legal landscape where sale of goods is concerned came in the form of the Consumer Rights Act 2015. The Act has the aim of bringing together the existing legislation on the supply of goods and services and codifying the remedies for breach of goods contracts.

The key changes under the 2015 Act (which applies to business to consumer contracts entered in to on or after 1 October 2015) are as follows:-

- The introduction of a tiered system of remedies available to consumers where the goods supplied are not in compliance with the contract. These are the short term right to reject, the right to repair or replacement and, finally, the right to a price reduction or the final right to reject.
- New rules applicable to goods that are both supplied and installed by a trader, or installed under the supplier's responsibility.
- Changes to the regulation of exclusion clauses and unfair terms, making attempts to exclude or restrict certain terms in business to consumer contracts subject to an outright ban. These include, by way of example, terms which seek to exclude liability where goods are of unsatisfactory quality or unfit for a particular purpose.

As the 2015 Act only came into force relatively recently, we have yet to see any test cases making their way through the Courts. However, it is anticipated that we will start to see litigation in instances where customers claim the right to progress to the next tier of remedies under the Act and the trader is not satisfied that the customer is entitled to do so, and also around the final right to reject, which allows for a deduction for use of the goods in certain circumstances, which will no doubt generate litigation as to how much of a deduction is permissible.

## "Goods and "sale of goods"

Outside of the 2015 Act, there have also been some interesting cases before the High Court and Supreme Court in relation to the legal interpretation of the words "goods" and "sale of goods".

In May of this year, the Supreme Court handed down a much-anticipated decision in relation to the interpretation

of a fuel supply agreement, and whether this was a contract for the sale of goods within the meaning of the Sale of Goods Act 1979 (which, by way of reminder, continues to apply to business to business contracts and business to consumer contracts entered in to before 1 October 2015). The case, *PST Energy 7 Shipping LLC v. OW Bunker Malta Limited*, was a shipping case dealing with the supply of bunkers of marine fuel to vessel owners. The bunkers were sold for immediate use but on 60 day credit terms, with a retention of title clause in place pending payment.

When the supplier, OW Bunkers, became insolvent, the vessel owners sought a declaration that they were not bound to pay for the bunkers on the basis that title in the fuel had not passed to them, in breach of the Sale of Goods Act 1979. However, the Supreme Court determined that the contract was not a contract for the sale of goods within the meaning of the Act as there was no transfer of property in the bunkers used before payment. To quote Lord Mance, who delivered the leading judgment in the case, "*the property in bunkers consumed never passes and [was] never agreed to be passed*".

As such, the vessel owners could not rely on the Act and had no defence to the claim for payment.

## Can software be goods?

In another case dealing with the interpretation of the word "goods", the High Court was asked to consider the definition of that word for the purposes of the Commercial Agents Regulations 1993. The Claimant agent, The Software Incubator Limited ("SIL"), had entered into an agreement with the Defendant, Computer Associates UK Limited, to act as agents for the promotion of software in the UK for an initial term of 12 months. The Defendant later gave notice to terminate the agreement and SIL claimed damages for breach and compensation and commission under the Regulations. The Defendant argued that there was no claim under the Regulations because the sale of software being promoted by SIL was not "the sale of goods" for the purposes of the definition of a commercial agent under the Regulations.

A commercial agent is described, for the purposes of the Regulations, as somebody who has continuing authority to negotiate the sale or purchase of goods on behalf of another person. In determining whether software could be classed as "goods" in this context, the High Court considered the nature of the software. Although this was not a tangible item, the Court found that "as a piece of sophisticated, commercial non-bespoke software, it would be regarded, at the very least as a 'product' ". In addition, in spite of it being intangible, the software could only operate in a tangible environment, and for the purposes of the disputed agreement, the software was treated as tangible goods. Accordingly, the Court found that the fact of the software being intangible did not preclude it from being regarded as "goods".

The High Court also considered whether a supply of software could constitute a "sale" of goods for the purposes of the Regulations. The Defendant had suggested that because, in some instances, the software might be supplied on a limited licence, there was no "sale". However, the Court relied on a previous authority from the European Court of Justice and the desire for the concept of "sale" to be regarded as an autonomous EU concept. Having this in mind, and also the fact that the agreement itself referred to "sales" of the software, the Court determined that there was a sale. Most customers would receive a permanent licence for the software limited only to specific conditions in relation to breach. The Court stated that "*the intention, as with the sale of any product [was] that the purchaser has the unfettered ability to use it forever subject to copying restrictions and so on*".

Interestingly, the decision in this case further demonstrations that the Sale of Goods legislation is evolving to accommodate contracts for the supply of software, this being embodied in the 2015 Act, which sets out specific principles in relation to the supply of digital content. Although the definition of "goods" for the purposes of the Regulations may not be apt for the purposes of the 2015 Act, which gives software its own category of treatment (as noted by the High Court in the SIL case), the legislation and the case demonstrate how the law of sale of goods continues to evolve and to adapt. No doubt the law will develop further as cases begin to be decided under the 2015 Act, and businesses will need to keep up-to-date with the changes to avoid falling foul of the legislation.

*Rebecca Latus*

# Why isn't "no fault divorce" possible in England and Wales?

Invariably when asked why they want a divorce the majority of Clients respond "irretrievable breakdown". This is the conclusion that they have come to over time. It is rare to decide to divorce on the spur of the moment. Usually it takes a minimum of 6 months from deciding that they wish to leave the marriage, to taking the first step to do something about it. Once they have told the other Party and they are therefore dealing with the aftermath of that discussion, they then usually want everything to be sorted out in a quick, easy and cost effective way. By easy what they often mean is – in a way that minimises further upset. After all they have just had a very difficult conversation with someone that they once loved.

At present – if the other person has not committed adultery and if they don't want to spend a minimum of 2 years in limbo, then although the Client may not wish to do so – they have to list allegations of the other person's behaviour that could be considered unreasonable.

There may be a few who need to blame the other person but even those people will often acknowledge that the reasons for the martial breakdown are not one sided – the situation is far more complex than that. In reality as a consequence of both spouses either doing or saying things, or them not doing or not saying things and the two of them then not being able to discuss why and work out a way forward, they have reached the point where one of them has decided that they would prefer to end the marriage rather than continue it.

**Perhaps rather than "no fault divorce" it should be "no blame divorce"**

Many Clients cry whilst they explain that they have decided to bring their marriage to an end; many Clients are angry – often with themselves; they feel they have failed; mostly they are saddened by what has happened and they are anxious about the trauma that they believe is about to unfold. There are too many horror stories and too few occasions that they know of where a couple have divorced in a dignified way.

Most importantly although one Party may have decided that the marriage is at an end – their role as a parent is not at an end. If there are children – apportioning blame is unlikely to assist the transition to achieving good ongoing parental arrangements.

Earlier this year, for the third time, Richard Bacon's Private Members Bill failed to be debated in Parliament because it was too low on the Order Paper. A letter was sent to David Cameron by the Chair of Resolution asking that the Government commit to introducing legislation that enables couples in England and Wales to divorce without having to attribute fault – this has been possible in Scotland since 2006.

It will be interesting to see whether Theresa May and her new Secretary of State for Justice Liz Truss give this issue greater priority.

Sheridan Ball

# Section 21 Notices

## An aide memoire following a raft of legislative changes

Section 21 Notices have long been regarded as the ace up the sleeve of a landlord who has rented out a residential property to a tenant on an Assured Shorthold Tenancy (AST). Provided a valid notice has been served, a section 21 notice enables a landlord to recover possession of a property without being required to prove any fault on the part of the tenant or any justification for wanting to recover possession.

A number of legislative changes have been made in recent months which have imposed additional burdens upon private residential landlords and which have impacted on the ability to serve a section 21 notice. The following, therefore, is intended to be a summary of key points for private residential landlords to keep in mind when considering issuing a section 21 notice.

### Prior to any notice being served

- A Section 21 notice can only be served in relation to an Assured Shorthold Tenancy ('AST').
- If a fixed term has been granted (most ASTs have a 6-12 month fixed period), the Section 21 notice cannot expire before the end of the fixed term.
- If a tenant has paid a deposit, it must be deposited with a Tenant Deposit Scheme by the landlord within 30 days of the deposit being paid by the tenant. If the deposit has not been protected within this 30 day period, no Section 21 notice can be issued unless the deposit has first been returned to the tenant.
- Prescribed information regarding the deposit must be provided to the tenant within 30 days of the deposit having been deposited with a Tenant Deposit Scheme, failing which no section 21 notice can be issued until such time as that information is provided. See below for more details in respect of tenancies commencing on or after 1 October 2015
- If the tenancy started on or after 1 October 2015,
  - a 21 notice cannot be issued within the first 4 months of the tenancy.
  - The tenant must have been provided with the prescribed information in the form of the Department for Communities and Local Government's "*How to Rent: The Checklist for renting in England*" (gov.uk/government/publications/how-to-rent) booket.
- the service of a retaliatory section 21 notice (where a landlord serves a notice in response to a Tenant raising a grievance with the property) is prohibited.


- a valid EPC and Gas Safety Certificate must have been provided to the tenant prior to a section 21 notice being issued.

### When serving the notice

- For ASTs commencing on or after 1 October 2015
  - Section 21 notices must be in a new prescribed form. There is no requirement for landlords to use the new notices in relation to tenancies pre-dating 1 October 2015.
  - Section 21 notices no longer have to expire on the last day of a period of the tenancy. This even is the case where a tenancy is a periodic tenancy, but see below a warning regarding pre-1 October 2015 periodic tenancies.
  - Where a landlord is required to give the standard 2 month section 21 notice (where the tenancy is a weekly or monthly tenancy), proceedings must be commenced no later than 6 months after the date the section 21 notice is served upon the Tenant.
- Where a landlord is required to give more than the standard 2 month section 21 notice (where rent is paid, for example, quarterly or yearly), proceedings must be issued no later than 4 months after the termination date specified in the section 21;
- For AST's commencing prior to October 2015, there is no requirement to use the new notice, though the expectation is that the new notice will be used in all cases by landlords so as to avoid any inadvertent use of a pre-1 October 2015 notice in relation to a post 1 October 2015 AST. Care must be taken, however, if the tenancy is a pre-October 2015 AST and has always been periodic. In those circumstances, to avoid risk of the validity of the notice being challenged, landlords should ensure their section 21 notice expires at the end of a period. They may, as a result wish to continue using the pre-1 October 2015 periodic tenancy section 21 notice with its 'catch all' provision in those specific circumstances.

Concerns have been expressed that the recent changes create confusion and increase the risk of inadvertent technical breaches rendering section 21 notices invalid, making it more difficult for landlords to recover possession of their properties. However a Section 21 notice still provides an effective means to bring an AST to an end. Rollits' Property Dispute Resolution Team has considerable experience in drafting and advising upon section 21 notices and are able to assist any landlords or tenants with any section 21 concerns.

*Chris Drinkall*

# Definitive sentencing guidelines for Health & Safety, Corporate Manslaughter and Food Safety takes effect

**1 February 2016** marked one of the biggest changes in the landscape of health and safety sentencing for a number of decades.

Many large businesses subject to prosecution for health and safety offences have seen the fines that would previously have been imposed rocket to upwards of one million rather than the tens of thousands.

This is a change that the Sentencing Council are hoping will ensure that it is no longer cheaper for a business to cut corners and run the risk of prosecution than it is for them to comply with their legal duties.

The new sentencing guidelines apply to health and safety offences, instances of Corporate Manslaughter and breaches of food safety legislation. The guidelines apply to a variety of offences from minor accidents in the workplace to accidents resulting in death.

The guidelines introduced a new "stepped approach" to the sentencing of these offences which will be applied consistently by the Courts. Previously there was very little guidance for those sentencing organisations where, for instance, very serious and life changing injuries had resulted from an accident. The new "stepped approach" involves an assessment of an organisation's culpability together with the risk of harm caused by the failing concerned.

Sentences are imposed proportionately based on an organisation's turnover. This means that large companies (i.e. those with a turnover of £50 million and over), in situations when an accident results in serious injury, will see the Court working from a starting point of upwards of £750,000 to £1,000,000 when determining what level of fine to impose.

Awareness of the implications of the guidelines is must for all organisations.

*Jennifer Sewell*

# Term time holidays – the story continues

In May this year the Court ruled that a father who had taken his daughter out of School for a family holiday did not have to pay a fine which had been imposed upon him by Isle of Wight Council. The Council issued the father with a fine which was unpaid and subsequently brought a prosecution for failing to ensure that his daughter attended School regularly contrary to the Education Act 1996. The father argued successfully that even taking into account the absence due to the family holiday, the daughter's attendance remained above 90%, being the threshold for persistent truancy as defined by the DfE. The Court agreed with him, finding that he had no case to answer as, overall, his daughter had attended School regularly. The High Court subsequently refused the Council permission to appeal but the Council could make its own application to the Supreme Court – a step which appears to have the support of Government. The issue of term time holidays is clearly an issue of general public importance, a view shared by Lord Justice Lloyd Jones. Whilst we await any further decision from the Supreme Court the position in relation to unauthorised term time absences remains unsatisfactory for many Schools trying to enforce the Government's strict policy in this area and for parents who face uncertainty.

*Caroline Hardcastle*


## Rollits Family Law on Twitter

Keep up-to-date with all the latest news, updates and events from Rollits Family Law team by following them on their official Twitter account **@RollitsFamily**

## Information

If you have any queries on any issues raised in this newsletter, or any dispute resolution matters in general please contact Sheridan Ball on 01482 337361.

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice.

We hope you have found this newsletter useful. If, however, you do not wish to receive further mailings from us, please write to Pat Coyle, Rollits, Citadel House, 58 High Street, Hull HU1 1QE.

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